No. 11713

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK JOHN WOLFE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

UPON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR PETITIONER

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SUBJECT INDEX OF THE MATTER IN THE BRIEF

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

Table of Cases

PAGE

Table of Statutes

Table of Treasury Regulations and Rulings

Table of Textbooks

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE TAX COURT OF THE UNITED STATES HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION UPON PETITION TO REVIEW THE DECISION IN QUESTION

Jurisdiction of The Tax Court of The United States

1. *The statutory provisions believed to sustain the jurisdiction of The Tax Court of The United States.* The statutory provisions believed to sustain the jurisdiction of The Tax Court of The United States are sections 272 (a)(1)

and 1101 of the Internal Revenue Code [1] (Title 26, United States Code). Prior to December 11, 1944, the respondent determined that there was a deficiency in respect of the tax imposed by Chapter 1 of the Internal Revenue Code (Title 26, United States Code) and on December 11, 1944, he sent notice (R. pp. 9-12) of such deficiency to the petitioner by registered mail. Within ninety days after such notice was mailed, on March 5, 1945 (R. p. 2), the petitioner filed a petition (R. pp. 4-8) with The Tax Court of The United States [2] for a redetermination of the deficiency.

2. *The pleading necessary to show the jurisdiction of The Tax Court of The United States.* The pleading necessary to show the jurisdiction of The Tax Court of The United States is the petition (R. pp. 4-12).

Jurisdiction of This Court

1. *The statutory provisions believed to sustain the jurisdiction of this Court.* The statutory provisions believed to sustain the jurisdiction of this Court are sections 1141 and 1142 of the Internal Revenue Code [3] (Title 26 of the United States Code). The decision of The Tax Court of The United States was rendered, after February 26, 1926 and after June 6, 1932, on April 1, 1947 (R. p. 40). The office of the collector of internal revenue to which was made the return of the tax in respect of which the liability arises was the Office of the Collector of Internal Revenue for the Sixth District of California (R. pp. 4, 12, 16). Said Collector's office is located in the Ninth Judicial Circuit of

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[1] The Tax Court of The United States is referred to in the sections cited as "The Board of Tax Appeals". The name was changed by section 504 (a) of the Revenue Act of 1942 (Section 504 (a), Ch. 619, Title V, 56 Stat. 957).

[2] *Ibid.*

[3] *Ibid.*

The United States. Within three months after the said decision was rendered, on June 25, 1947 (R. p. 3), petitioner filed a petition for the review of said decision by this Court.

2. *The pleading necessary to show the jurisdiction of this Court.* The pleading necessary to show the jurisdiction of this Court is the petition for review of decision of The Tax Court of The United States (R. pp. 41-45).

ABSTRACT OR STATEMENT OF THE CASE

(Hereinafter, in this brief for the petitioner, Imperial Oil Co., Ltd., a Canadian corporation (R. pp. 16, 19) will be referred to as "Imperial", Standard Oil Company of New Jersey will be referred to as "Standard", Standard Oil Export Company will be referred to as "Export", and Anglo-American Oil Co., Ltd., an English corporation (R. pp. 5, 13, 16) will be referred to as "Anglo".)

Petitioner is an individual (R. pp. 4, 5, 12, 13, 16), citizen of Canada (R. pp. 5, 13, 16). Petitioner has never been in the employ of Standard (R. pp. 68, 86) or Export (R. p. 68). From the time of his birth in 1879 and until 1931 petitioner was a resident of Canada (R. p. 16).

In June, 1902, petitioner entered the employ of Queen City Oil Co., Ltd. (R. pp. 16, 19, 29, 59, 64), a Canadian corporation (R. pp. 16, 59), which was, in 1911 or 1912, absorbed by Imperial (R. pp. 16, 19, 29, 59). Imperial was largely owned by Standard (R. pp. 29, 59, 60). Petitioner continued in the employ of Imperial until March 1, 1931 (R. pp. 16, 59), at which time he was Vice-President and a member of the Board of Directors (R. p. 59).

Two or three months prior to March 1, 1931, petitioner was requested by Mr. G. Harrison Smith, the Senior Vice-President of Imperial, to go to England and take over the

duties of Managing Director of Anglo (R. pp. 16, 60, 73). Petitioner and Mr. Smith discussed the salary petitioner was to receive (R. pp. 17, 60-61). Petitioner told Mr. Smith he would go to England (R. p. 60).

Thereafter, and prior to March 1, 1931, petitioner had conversations with officials of both Standard (R. pp. 17, 60) (which controlled the stock of Export (R. p. 60)), and Export (R. pp. 17, 60) (which controlled the stock of Anglo (R. p. 60)). These conversations were had so that petitioner might obtain knowledge of the background of Anglo (R. pp. 17, 60).

In none of petitioner's conversations, referred to in the two paragraphs immediately preceding, with officers of Imperial, Standard, and Export, was the question of petitioner's retirement pay in the event of his eventual retirement discussed. It was not mentioned in any way, shape or form (R. p. 61). Standard did not guarantee the payment of retirement pay to petitioner (R. pp. 73-74). Petitioner had nothing in writing to evidence the fact that he was being offered the position with Anglo and he never did have a written contract of employment (R. pp. 74-75).

While, as stated in the next preceding paragraph, petitioner did not discuss with anyone the matter of his retirement pay in the event of his eventual retirement, he knew that Anglo had a scheme or plan in existence for paying its retired employees. Petitioner did not know much about the actual details of the plan, but he knew that the basis of the plan was that an employee was entitled on retirement to roughly 2 per cent per year of service, based on a maximum of 75 per cent, and the average of the last 5 years' pay. Retirement at 60 for one who had the full 37½ years of service would be about 66.3 per cent (R. p. 17). Petitioner understood that he would be entitled to the benefits of this

plan as an officer of Anglo, but this understanding of his was not based on any discussion of the matter with any officer of Imperial, Standard, or Export (R. p. 61).

On March 1, 1931, petitioner went to England (R. p. 59) and became Managing Director of Anglo (R. pp. 5, 13, 16, 23, 59, 73). In an English company the duties of a managing director are similar to those of an executive vice-president of an American corporation (R. p. 62). On July 1, 1931, petitioner also became Chairman of Anglo (R. pp. 5, 13, 16, 61). In an English company the duties of a chairman are similar to those of the president of an American corporation. Anglo had no president (R. pp. 61-62).

As heretofore stated, petitioner had assumed when he went to England that he would be entitled to the benefits of Anglo's superannuation scheme, which he knew to be in existence and the general basis of which he understood. After he arrived in England, he discovered that he was not eligible to participate in that plan because that plan required that an employee, to participate, must have been in the employ of Anglo in May, 1928. Furthermore, petitioner discovered that the funds of Anglo's superannuation plan were invested in stocks which he did not consider to be proper investments. The fund was not in a very sound financial condition (R. pp. 63, 65).

As a result of these discoveries, after March 1, 1931 and prior to October 22, 1931, petitioner discussed with other executives of Anglo the question of payments to be made to him in the event of his retirement from the services of Anglo (R. pp. 17, 29, 62, 64). Petitioner told these executives very plainly that he wanted to be considered on the same basis as those who were under the superannuation plan (R. pp. 17, 64). Petitioner also had a conference with certain officers of Standard. At this conference it was de-

cided that "this question is to be deferred until the Anglo-American Oil Company has revised its annuity plan". It was recognized at the conference with Standard that if the proposed revision of Anglo's plan did not "fully take care of Mr. Wolfe's case", "the matter will have to be given special consideration at the proper time" (R. pp. 18, 80-81).

In the negotiations between petitioner and other executives of Anglo, referred to in the preceding paragraph, but not in the negotiations with officers of Standard, there was also discussion of the length of time that Anglo was to consider that petitioner had been in its employ (R. p. 64). As a result of these discussions, it was decided that petitioner was to be treated as if he had been in the employ of Anglo from the date in June, 1902 when he entered the employ of the Queen City Oil Co., Ltd. (R. pp. 19, 64).

On October 22, 1931 the Board of Directors of Anglo adopted a resolution to dispose of both of the questions which had been raised by petitioner—namely, the question of whether petitioner would be considered on the same basis as those who were entitled to the benefits of Anglo's superannuation plan and the question of the length of time Anglo was to consider that petitioner had been in its employ. Said resolution was as follows:

> "Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Director, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd. (which was subsequently absorbed by the Imperial Co., Ltd., of Canada), and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof." (R. pp. 19, 64, 67).

On October 23, 1931 petitioner was formally advised of the adoption of said resolution by the Secretary of Anglo (R. p. 64).

Petitioner suffered from asthma. He had been advised by his physician on many occasions that England was not a proper climate for him and that when the opportune time came he should get out of England and go to a warmer country, such as California (R. pp. 65-66).

In 1939, petitioner began discussing the possibility of his retirement with the financial director of Anglo, a Mr. Carder. Petitioner told Mr. Carder that he intended, after his retirement, to live in the United States and that he would want his annuity payable to him in dollars. To that Mr. Carder was agreeable. They discussed the possibility of purchasing an annuity for the petitioner from an insurance company (R. p. 66).

Mr. Carder suggested that a solution to the problem might be for Anglo to pay a certain amount of money to Standard, the latter to pay the annuity (R. p. 66). Petitioner then discussed the matters he had discussed with Mr. Carder with an official of Standard (R. p. 67).

In the negotiations with Standard, various proposals were made and disposed of as follows:

1. *With respect to petitioner's proposal that the annuity be payable in dollars.* In petitioner's discussions with an officer of Standard, the latter particularly asked petitioner what the rate of exchange was that he wanted and petitioner told him $5.00 to the pound. To that the officer was in agreement (R. p. 67). However, on June 16, 1939, the same officer of Standard addressed a letter to petitioner in Toronto, Canada, in which he said:

> "... The problem of paying your annuity in dollars at this end has been left for future consideration." (R. pp. 87-88).

A memorandum accompanying said letter gave "the amount of annuity" due petitioner, assuming his retirement on various dates, in pounds, not in dollars (R. p. 89). In a memorandum dated June 21, 1939, prepared by an employee of Standard, the annuity due petitioner, assuming retirement on various dates, was shown in dollars, converted at $4.68 to the pound (R. p. 92). In a memorandum from one executive of Standard to another dated June 29, 1939, it was stated:

> "We *understand* (italics supplied) that under the agreement with Mr. Wolfe, he is to receive upon retirement, a life annuity . . . payable in the United States in dollars converted at the rate of $5.00 to the pound." (R. p. 20).

The memorandum then proceeded to show the amount of the "annuity" due petitioner, assuming retirement on various dates, payable in dollars, converted both at $5.00 to the pound and at $4.68 to the pound (R. pp. 81-82). The memorandum then proceeded:

> " . . . *subject to proper approval, it is proposed* (italics supplied) that the annuity be paid by New York in dollars, converted at the rate of $5.00 to the pound. . . . Any cost incurred in New York by reason of a sterling rate less than $5.00 would be absorbed by Jersey and charged to such account as may be later determined." (R. pp. 20-21, 81-83).

As will be hereinafter pointed out, the agreement eventually made provided that petitioner's annuity be paid to him in dollars and at $5.00 to the pound.

2. *The proposal that an annuity be purchased for petitioner from an insurance company.* On June 21, 1939, an employee of Standard submitted a memorandum to an executive of Standard reading as follows:

> "In submitting the attached memorandum in connection with the case of F. J. Wolfe, because of the

sizeable amounts involved I think I should ask you whether you are interested in having a similar statement prepared showing the cost of the 'excess,' that is, the amount over $20,000 annually, on a refund basis. This type of contract guarantees an annuity for the life of the annuitant and, in addition, provides that if at the death of the annuitant the guaranteed annuity payments made by the insurance company do not equal the consideration paid, the annuity payments will be continued to a beneficiary until the guaranteed return equals the consideration. The original outlay, of course, would be considerably higher, but you might want to consider it particularly if Mr. Wolfe is not in good health. So far as concerns the $20,000 annual purchase under contract 255, any surplus resulting by death shortly after retirement would be reflected in dividends.

I do not think we should proceed on the definite assumption that the purchase of such a large amount can be made from an insurance company. In so far as the Equitable is concerned, they have indicated that if they were asked to write such a contract at the present time they would have to think over the matter. There is the further point that if we are going the insurance company route you might wish to consider a non-par company, in which event the rates would be slightly less than those used in computing the capital value shown on the attached statement, but there would be no dividends to the annuitant.

If the retirement goes through you might wish to give consideration to having the payments made from New York with a periodic billing to Anglo. It might turn out to be to the Company's benefit to handle the matter under such an arrangement if Mr. Wolfe is in poor health.

K. N. R.

KNR:HMC

Memorandum Re Mr. F. J. Wolfe

Mr. F. W. Pierce:

June 21, 1939

The following is the information you asked me for in connection with the approximate capital value of Mr. Wolfe's annuity, for the various dates and amounts indicated in the attached memorandum of June 16, to Mr. Wolfe:

	Assuming retirement effective				
	1/1/40	7/1/40	1/1/41	7/1/41	1/1/42
Annual annuity in dollars converted on basis of rate of exchange 6/20/39 ($4.68)	$ 33,204	$ 34,131	$ 35,212	$ 36,447	$ 37,837
Cost to purchase $20,000 annually under contract AC-255 (absorption contract) . .	267,715	263,732	259,749	255,766	251,783
Cost to purchase balance as individual participating life annuity (payments to commence month after purchase) — See note	192,745	203,433	215,940	230,175	246,341
Total cost	$460,460	$467,165	$475,689	$485,941	$498,124

Note: Under the individual participating life annuity the annuitant would share in any dividends payable by the insurance company. The Equitable advises me that under present conditions the dividend at the end of the first year the contract is in effect would approximate 7½% of the annual annuity; at the end of the second year, 8½%; third year, 8.6%; fourth year, 8.7%; and fifth year, 8.8%. To take the dividends into account in fixing the amount of the annuity it would be necessary to reduce the grant by about 7%.

K. N. R.

KNR:HMC" (R. pp. 90-93.)

In a memorandum dated June 29, 1939, from one executive of Standard to another, it was said:

> "... subject to proper approval, it is proposed ... In the event of Mr. Wolfe's death prior to retirement, the capital contribution * plus 3% interest, computed annually, would be returned to Anglo *unless the pension had meanwhile been insured* in which event, the premium refund, if any, would be determined in accordance with the provisions of the insurance contract under which it was purchased. ..." (R. pp. 20-21, 81-83.) (Italics supplied.)

The proposal to purchase an annuity for petitioner from a commercial insurance company was never put into effect (R. p. 19).

3. *Mr. Carder's proposal that Anglo pay Standard a sum certain and that Standard pay the annuity to petitioner.* As heretofore pointed out, petitioner's negotiations with Standard were the result of a suggestion by Mr. Carder, the financial director of Anglo, that the problem of petitioner's annuity might be solved by an arrangement whereby Anglo would pay Standard a certain sum of money and Standard would pay the annuity. (See page 7 herein, and R. pp. 66-67.) That this proposal did not meet with immediate acceptance by Standard is indicated by the fact that on June 21, 1939, in a memorandum from an employee of Standard to an executive of Standard, it was stated:

> "If the retirement goes through you might wish to give consideration to having the payments made from New York with a periodic billing to Anglo. It might turn out to be to the Company's benefit to handle the matter under such an arrangement if Mr. Wolfe is in poor health." (R. p. 91).

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* The amount to be transferred by Anglo to Standard.

However, on June 29, 1939, an executive of Standard wrote another executive of Standard as follows:

> " . . . subject to proper approval, it is proposed that . . . In view of the uncertainties of the future and in order to assure that the necessary funds be available here when needed, . . . Anglo transfer to S. O. Co. of N. J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability, assuming retirement as of January 1, 1940, computed on a 3% interest basis and discounted for mortality but not for labor turnover due to any other cause. This transfer would be dollars at the rate of exchange prevailing at the time of payment. If retirement occurs at a later date, Anglo would make the necessary additional capital contribution. In the event of Mr. Wolfe's death prior to retirement, the capital contribution plus 3% interest, computed annually, would be returned to Anglo unless the pension had meanwhile been insured in which event, the premium refund, if any, would be determined in accordance with the provisions of the insurance contract under which it was purchased. Any cost incurred in New York by reason of a sterling rate less than $5.00 would be absorbed by Jersey and charged to such account as may be later determined. . . . " (R. pp. 20-21, 82-83).

On August 4, 1939, Mr. Carder, the financial director of Anglo, who had originally suggested the arrangement by which Anglo was to pay a sum certain to Standard and Standard was to pay an annuity to petitioner, wrote an official of Standard as follows:

> "With regard to the discussions which Mr. Wolfe had during his recent visit to New York, as summarized in memorandum dated 29th June 1939 from Mr. J. W. Myers to Mr. T. C. McCobb, as the pro-

cedure proposed entails obligations on all three parties affected and is of considerable importance, it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement.

"Accordingly, such agreement has been drawn up by Mr. Montagu Piesse and is enclosed herewith and we suggest that the Jersey company should complete this in triplicate, sending all three copies to us for completion by ourselves and Mr. Wolfe, following which one copy would be returned to you.

"Our actuary advises us that the capital liability of the amount of annuity if payable as from 1st January 1940 works out at £88,049 and the present value of this as at 1st September 1939 is £87,177—. It is this latter amount which should be inserted in the agreement and on completion of the documents we would therefore either hold at your disposal or remit this sum to you." (R. pp. 22, 83-84).

On August 22, 1939, Anglo sent Standard £87,177—the amount mentioned in the letter just quoted as the "present value" of "the capital liability of the amount of annuity *if payable from 1st January 1940.*" (Italics supplied.) This amount was converted by Standard into $408,097.33 in United States currency at the official rate of exchange on that date (R. p. 26).

Petitioner definitely decided to retire in August 1939, but the date of his retirement was not fixed until later (R. p. 76).

On December 31, 1939, Anglo paid Standard £1943, which was converted by Standard into $7,689.42 in United States currency at the official rate of exchange on that date (R. p. 26).

On January 9, 1940, an official of Standard wrote to R. A. Carder, a letter reading, in part, as follows:

> "Final arrangements have been made, satisfactory to Mr. Wolfe, so that his retirement will become effective July 1, 1940. *Although our formal setup for taking care of the annuity is not completed, we have undertaken to guarantee Mr. Wolfe that the money which you have provided* (italics supplied), plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled, and there is no reason, therefore, why you should not formally record the transaction" (R. pp. 22-23).

The amount of £1943 paid by Anglo to Standard on December 31, 1939, represented "the difference between Anglo's initial contribution of £87,177" (which had been made on the assumption that the petitioner would retire on January 1, 1940) "and a contribution of £89,120, the latter being the amount agreed upon with retirement effective July 1, 1940" (R. p. 96).

On March 22, 1940, "an agreement of annuity" drawn by an official of Standard was entered into between Anglo (which executed the agreement in London (R. p. 58)), Standard and petitioner (petitioner and Standard executed the agreement in New York (R. p. 58)), the pertinent parts of which read as follows:

> "Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that payment of such sterling pension would be

guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.

And Whereas, Mr. Wolfe is to be retired from the service of the Anglo Company on the first day of July, 1940.

And Whereas, the Anglo Company is unable to grant formally an annuity to Mr. Wolfe under its own superannuation scheme or pay same from its superannuation fund for the reason that such scheme and related fund are not applicable to any person who entered the employ of the Anglo Company subsequent to May 18, 1928.

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,120-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

And Whereas, the Standard Company has agreed to accept the aforesaid £89,120-0-0 from the Anglo Company and to pay Mr. Wolfe a life annuity as hereinafter provided.

Now It Is Hereby Witnessed as follows:

1. That in consideration of the aforesaid understanding with Mr. Wolfe the Standard Company hereby covenants to pay Mr. Wolfe a life annuity of $3,038.75 per month, effective July 1, 1940, with the understanding that should Mr. Wolfe's present wife, Marguerite W. Wolfe, survive him, monthly payments in the amount of $3,038.75 each will be continued and paid to her for a period not to exceed twelve months and in no case beyond the date of her death.

2. Mr. Wolfe hereby accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies.

3. In consideration of Mr. Wolfe's valuable services to the Anglo Company, the Anglo Company has paid to the Standard Company, as a contribution toward the cost of the annuity settlement, the sum of £89,120-0-0, the receipt of which sum the Standard Company doth hereby acknowledge.

4. In consideration of the aforesaid payment the Standard Company hereby indemnifies and for all time agrees to keep indemnified the Anglo Company from and against any liability which the Anglo Company might otherwise have had to Mr. Wolfe in respect to a pension.

5. If Mr. Wolfe shall die prior to July 1, 1940, then the Standard Company will forthwith on the death of Mr. Wolfe being proved to their reasonable satisfaction repay to the Anglo Company the £89,-120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof with interest thereon at the rate of 3% per annum from the date of payment until the date of repayment.

6. If Mr. Wolfe shall die on or after July 1, 1940, then the Standard Company shall be under no obligation to repay to the Anglo Company any portion of the sum of £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof'' (R. pp. 23-26).

The official rate of exchange on March 22, 1940, was $3.724305 in United States currency for each English pound (R. p. 58).

Petitioner retired from the employ of Anglo on July 1, 1940. The official rate of exchange on July 1, 1940, was $4.035 in United States currency for each English pound (R. pp. 58-59).

Beginning with a payment on July 31, 1940, petitioner has received $3,038.75 per month (or $36,465 per year) from Standard pursuant to the agreement of March 22, 1940 (R. p. 26). The $36,465 per year thus received from Standard

is the equivalent of £7,293 converted at $5 to the pound. £7,293 is the maximum annuity petitioner could have demanded from Anglo on his retirement on July 1, 1940, under the resolution of October 22, 1931 (R. p. 67).

On December 11, 1940, an official of Standard requested another official of Standard to secure signature cards from petitioner "to whom we pay a special annuity" (R. p. 97).

During the time that petitioner served as an executive of Anglo, from March 1, 1931 to July 1, 1940, neither Standard nor Export ever dominated the administration policies of Anglo. Anglo bought oil and gasoline from Standard, but it also bought it from other people. The administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo (R. p. 65).

From March 1, 1931, to October 4, 1941, petitioner was a resident of England, a non-resident alien with respect to the United States (R. pp. 5, 13, 16). On October 4, 1941, he entered the United States under the authority of an immigration visa intending to become a resident (R. pp. 5, 13, 71). From October 4, 1941, until the date of the trial of this cause before The Tax Court of the United States, petitioner was a resident of the United States.

Petitioner reported in his income tax return for the calendar year 1941, the sum of $3,041.51 as "income from annuities" with the following explanation:

> "The taxpayer receives an annuity from the Standard Oil Company of New Jersey, the payments being made at the rate of $3,038.75 per month. The payments received in 1941 during the taxpayer's residence in the United States totalled $8,822.18. The cash consideration paid to the Standard Oil Company of New Jersey totalled $415,786.75.* The taxpayer

* This was the sum of the $408,097.33 paid August 22, 1939 (see page 13 herein) and the $7,689.42 paid December 31, 1939 (see page 13 herein).

> is excluding from his gross income the amount of $5,780.67, representing the excess of the annuity payments received over three per centum of the principal amount for the period during which the taxpayer was a resident of the United States'' (R. p. 71).

On December 11, 1944, the respondent mailed to petitioner a statutory notice of deficiency in the amount of $1,101.49 in income taxes for the year 1941 (R. pp. 4, 9-11, 12, 15). Said notice stated:

> ''It is determined that the entire amount received by you from the Standard Oil Company of New Jersey during your residence in the United States constitutes gross income under the provisions of section 22 of the Internal Revenue Code. Accordingly, income from that source has been increased from $3,041.51 reported by you to $8,822.18'' (R. p. 11).

A timely appeal from this determination followed (R. pp. 4-8). From an adverse decision of The Tax Court of The United States (R. p. 40) this petition for review is taken (R. pp. 41-44). The opinion of The Tax Court of The United States is reported in 8 T. C. 689 and the findings of fact and opinion of The Tax Court of The United States will be found in the record on pages 14 to 40.

The question involved is whether, as the respondent will contend, the amounts received by petitioner from Standard during 1941 and while he was a resident of the United States are taxable in full or, as petitioner maintains, there should be excluded from gross income the excess of the amount so received over an amount equal to 3 per centum of the amount paid by Anglo to Standard as hereinbefore stated.

SPECIFICATION OF ERRORS RELIED UPON

The following is a specification of errors relied upon:

Specifications of Errors Relating to the Findings of Fact

1. *The Tax Court of The United States erred in failing to find as a fact that the deficiency from the determination of which this appeal was taken to The Tax Court of The United States was based upon a determination of the petitioner's taxable net income for the calendar year 1941, in which computation no part of the annuity paid to the petitioner by Standard was excluded from petitioner's gross income.*

Statement of wherein the findings of fact are, with respect to this the First Specification of Error, erroneous.— In paragraph 5 (j) of his petition to The Tax Court of The United States, the petitioner alleged that the deficiency from the determination of which the appeal to The Tax Court of The United States was taken, was based upon a computation of the petitioner's taxable net income for the calendar year 1941 in which computation no part of the said annuity was excluded from the petitioner's gross income (R. p. 7). This allegation was admitted by paragraph 5 (j) of the answer (R. p. 13). There is therefore no issue as to the truth of the allegation.

It was error not to find the admitted fact because the respondent's failure to exclude a portion of the annuity from petitioner's gross income is, in the last analysis, that of which the petitioner complains in this proceeding.

2. *The Tax Court of The United States erred in failing to find as a fact that petitioner did not, prior to March 1, 1931, discuss with any official of Standard or Export the*

question of his retirement pay in the event of his eventual retirement, and that the question of petitioner's retirement pay in the event of his eventual retirement was never, prior to March 1, 1931, mentioned in the conversations between petitioner and officials of Standard and Export in any way, shape or form.

Statement of wherein the findings of fact are, with respect to this the Second Specification of Error, erroneous.— On direct examination, petitioner testified: That prior to March 1, 1931, two or three months prior to that, Mr. G. Harrison Smith, who was the senior vice-president of Imperial, asked the petitioner if he (petitioner) would go to England to take over the duties as managing director of Anglo; that he (petitioner) had conversations with executives of Standard with respect to the matter of petitioner's going to England to take over this new position; that he (petitioner) talked with several of the executives; that he (petitioner) talked to Mr. Teagle, who was then president of Standard, to Mr. Hunt, who was one of the vice-presidents, to Mr. James Moffett, who was one of the vice-presidents, and to Mr. D. L. Harper, who was president of Export; that he (petitioner) talked to these gentlemen in Standard largely to get the background of Anglo (R. p. 60); that *he (petitioner) did not at any time discuss with Mr. Smith, Mr. Teagle, Mr. Hunt, or any of the other gentlemen whose names he had mentioned, the question of his (the petitioner's) retirement pay in the event of his eventual retirement; that the question of petitioner's retirement pay was never mentioned,—in any way, shape or form* (R. p. 61).

With respect to the first paragraph of the agreement of March 22, 1940, which provides that petitioner undertook the assignment as chairman and managing director of

Anglo on March 1, 1931, on the understanding that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo and that payment would be guaranteed by Standard (R. pp. 23-24), petitioner testified that there was no understanding with any officer of Standard or Imperial; that the understanding stated in that paragraph was petitioner's understanding; *that he had not discussed the matter with any official of Standard or Imperial* (R. p. 61).

On cross examination, petitioner testified that he (*petitioner*) *had no understanding as to his retirement pay at the time he entered the employ of Anglo* (R. p. 73).

No evidence contradictory to the foregoing was offered at the trial; therefore there is no issue as to truth of the fact which The Tax Court of The United States failed to find.

It was error not to find such fact. The respondent's entire theory in this case is that Standard was not the writer of an annuity, that, on the other hand, Standard was, in entering into the contract of March 22, 1940, satisfying an obligation of Standard to petitioner. The fact that petitioner did not even discuss with any officer of Standard the question of his retirement pay is certainly pertinent to the issue of whether Standard had an obligation to petitioner with respect to that retirement pay.

3. *The Tax Court of The United States erred in failing to find as a fact that the facts stated in the paragraph beginning "Whereas" of the contract between petitioner, Anglo and Standard, set forth in the eleventh paragraph of the findings of fact* (R. pp. 23-24), *are true except that there was no understanding with any officer of Standard*

or of Imperial that if petitioner were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard at an exchange rate of five dollars to the pound.

Statement of wherein the findings of fact are, with respect to this the Third Specification of Error, erroneous.— The undisputed evidence as to the truth of the facts stated in the paragraph beginning "Whereas" of the contract between petitioner, Anglo, and Standard (R. pp. 23-24) with respect to the alleged understanding with officers of Standard and Imperial that if petitioner were eventually retired from the service of Anglo he would receive a life annuity, etc. is set forth under specification of error 2. That evidence is all to the effect that there was no such understanding.

With respect to the alleged understanding prior to March 1, 1931, with officers of Standard that payment of such sterling pension would be guaranteed by Standard at an exchange rate of five dollars to the pound, the undisputed evidence is:

On direct examination the petitioner testified that he (petitioner) had always been a citizen of Canada (R. p. 59). As The Tax Court has correctly found as facts petitioner resided in Canada until 1931 and in England from 1931 to October 4, 1941 (R. p. 16). On cross examination petitioner testified that when he went to England in 1931 Standard did not guarantee the payment of a retirement to him (R. pp. 73-74). On direct examination, petitioner testified that: he was a real sufferer from asthma and had been advised by his physician that when the opportune time came he should get out of England and go to a warmer country,

such as California (R. p. 66); that prior to August 1939 he decided to retire (R. p. 65); that *after making the decision to retire,* he had conversations with an executive of Anglo in which he (petitioner) stated that he intended to live in the United States and that he would want his annuity payable to him in American dollars (R. p. 66), and that thereafter petitioner discussed the matter with an executive of Standard, in which discussion the executive of Standard particularly asked petitioner what the rate of exchange was that petitioner wanted (R. p. 67). On *June 16, 1939,* the same officer of Standard with whom petitioner had had said discussion wrote him (petitioner) that the problem of paying the annuity in dollars had been left for *future* consideration (R. pp. 87-88). A memorandum accompanying said letter of *June 16, 1939,* gave the amount of annuity due petitioner, assuming his retirement on various dates, *in pounds not in dollars* (R. p. 89). In a memorandum dated *June 21, 1939,* prepared by an employee of Standard, the annuity due petitioner, assuming retirement on various dates, was shown in dollars, *converted at $4.68 to the pound,* not at $5.00 to the pound (R. p. 92). In a memorandum from one executive of Standard to another dated *June 29, 1939,* it was stated as an understanding that petitioner was to receive a life annuity payable in the United States in dollars converted at the rate of $5.00 to the pound (R. p. 20) and that *subject to proper approval* it was proposed that the annuity be paid in New York in dollars, converted at the rate of $5.00 to the pound (R. pp. 20-21, 81-83).

From the foregoing undisputed evidence it is obvious that petitioner did not on *March 1, 1931,* undertake the assignment as chairman and managing director of Anglo on an understanding with officers of Standard that if he were eventually retired from the service of Anglo he would re-

ceive a life annuity based on the provisions of the superannuation scheme of Anglo as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of five dollars to the pound.

It was error to fail to so find as a fact. The respondent's case depends in large part on the premise that Standard assumed an obligation to petitioner prior to March 1, 1931. That Standard assumed no such obligation is certainly pertinent.

4. *The Tax Court of The United States erred in finding as a fact that when the petitioner undertook the assignment of chairman and managing director of Anglo at the request of Standard it was the understanding that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of five dollars to the pound.*

Statement of wherein the findings of fact are, with respect to this the Fourth Specification of Error, erroneous.— The undisputed evidence with respect to this specification of error is set forth under specification of error 2 and specification of error 3. Every bit of that evidence negatives, rather than affirms, the finding of The Tax Court of The United States. For example, disregarding for the moment the direct denials of the petitioner, why should a citizen of Canada, who had always been a resident of Canada, and who was taking a position in England, demand that an annuity to be paid to him on his eventual retirement from that position in England, be paid in American dollars? Or why, under such circumstances, should anyone

guarantee the payment of such an annuity in dollars? It is quite apparent that the idea of paying the annuity in dollars arose from the advice of petitioner's physician that, because of his asthma, he go to a climate such as California (R. p. 66) and that there was *no* discussion of payment of the annuity in dollars until *1939,* when petitioner decided to retire and live in the United States (R. pp. 65-66). If Standard *in 1931* had had an understanding that petitioner on retirement was to receive his annuity in dollars converted at $5.00 to the pound, why did an officer of Standard *in 1939* ask what rate of exchange petitioner would expect? If Standard *in 1931* had an understanding that petitioner on retirement was to receive his annuity in dollars, why did an officer of Standard *on June 16, 1939,* write that the problem of paying the annuity in dollars had been left for *future* consideration? If Standard *in 1931* had an understanding that petitioner on retirement was to receive his annuity in dollars converted at $5.00 to the pound, why did Standard compute the annuity *on June 16, 1939, in pounds,* not in dollars? And why did Standard *on June 21, 1939,* compute the annuity at a rate other than $5.00 to the pound? If *in 1931* Standard had an understanding that petitioner, on retirement, was to be paid his annuity in dollars converted at $5.00 to the pound, why was it that *on June 29, 1939,* the proposal that the annuity be paid in New York in dollars, converted at the rate of $5.00 to the pound, was "subject to proper approval"?

5. *The Tax Court of The United States erred in failing to find as a fact that when petitioner went to London in 1931 he was not eligible to participate in the superannuation scheme of Anglo because the superannuation scheme had been changed to preclude participation by anybody who came into the company after some time in May 1928.*

Statement of wherein the findings of fact are, with respect to this the Fifth Specification of Error, erroneous.— The petitioner testified on direct examination: That he found, when he went to England, that so far as he was concerned, with respect to the superannuation scheme of Anglo, he was not eligible because the scheme had been changed to preclude participation by anybody who came into the company after some time in May 1928 (R. p. 63).

There is no evidence to the contrary. Hence, there is no issue as to the truth of the facts in question.

It was error to fail to so hold. The fact that petitioner found that he was not eligible for Anglo's superannuation scheme was one of the reasons for the adoption by the board of directors of Anglo of the resolution of October 22, 1931 (R. p. 19) and is therefore pertinent.

6. *The Tax Court of The United States erred in failing to find as facts that during the time the petitioner served as managing director and chairman of Anglo, neither Standard nor Export ever dominated the administration policies of Anglo; that Anglo bought oil and gasoline from sundry people; that Anglo bought oil and gasoline from Standard and from others; and that the administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo.*

Statement of wherein the findings of fact are, with respect to this the Sixth Specification of Error, erroneous.— On direct examination, the petitioner testified: That during the time that he served as managing director and chairman of Anglo, neither Standard nor Export ever dominated the administration policies of Anglo; that Anglo bought oil and gasoline from sundry people; that Anglo bought from Standard; that Anglo bought from outsiders; and that the

administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo (R. p. 65).

On cross examination, petitioner testified: That he (petitioner) elected the board of directors of Anglo; that he nominated the people for election; that he thought that in all cases his nominations were agreeable to Standard; that in other words, Standard had the final say as to members of the board of directors of Anglo; that had Standard disapproved of one of his nominations, he presumed it would be one of their prerogatives, because of their one hundred per cent ownership of the stock of Anglo, to have elected any one else whom they had chosen (R. pp. 72-73).

The cross examination in no sense contradicts the direct testimony. There is therefore no issue as to the truth of the facts in question.

It was error to fail to so hold. The facts in question are pertinent as indicating that Anglo and Standard were separate entities and that the obligation of Anglo was not the obligation of Standard.

7. *The Tax Court of The United States erred in failing to find as a fact that the superannuation scheme of Anglo was not in a very healthy position because of the state of some of its investments and that from time to time the board of directors of Anglo made very liberal contributions to the superannuation fund to take care of liabilities Anglo owed to those who were under the plan.*

Statement of wherein the findings of fact are, with respect to this the Seventh Specification of Error, erroneous.— On direct examination the petitioner testified: That he found when he went to England that the funds of Anglo's superannuation scheme were invested in stocks which he did

not consider investment stocks; that in other words, he thought that the fund was not in a very sound financial condition (R. p. 63); that the superannuation scheme of Anglo was not in a very healthy position because of the state of some of its investments; that from time to time the board of directors of Anglo made very liberal contributions to the fund; that those contributions were made to take care of the liabilities Anglo owed to those who were under the plan; and that Anglo made contributions in excess of what they would have made except for the condition of the fund, the condition of the investments (R. p. 65).

This testimony was not contradicted. There is therefore no issue as to the truth of the facts in question.

It was error to fail to so hold. The facts in question were among the reasons for the adoption of the resolution of October 22, 1931 (R. p. 19) by the board of directors of Anglo, and are therefore pertinent.

8. *The Tax Court of The United States erred in failing to find as a fact that the petitioner wanted an annuity payable in dollars because he had been advised by his physician on many occasions that England was not a proper climate for him and he intended to go to the United States upon his retirement.*

Statement of wherein the findings of fact are, with respect to this the Eighth Specification of Error, erroneous.— On direct examination the petitioner testified: That prior to August 1939, he decided to retire from his position with Anglo; that he had been advised by his physician on many occasions that England was not a proper climate for petitioner; that petitioner was a real sufferer from asthma and had been advised by his physician that when the opportune time came, petitioner should get out of England and go to a warmer climate, such as California (R. p. 66); that after

making the decision to retire, petitioner had conversations with Mr. Carder, who was on the board of directors and was financial director of Anglo; that petitioner told Mr. Carder that he (petitioner) intended to live in the United States; that petitioner told Mr. Carder further that when he retired (and he was planning on retiring) petitioner would want his annuity payable to him in American dollars (R. p. 66).

This evidence was undisputed. There is therefore no issue as to the facts in question.

It was error to fail to so hold. The facts in question are pertinent in that they show why the annuity was payable in dollars and in that they negative the fact, erroneously found by The Tax Court of The United States, that payment of the annuity in dollars had been guaranteed by Standard in 1931.

9. *The Tax Court of The United States erred in failing to find as a fact that in 1939 the financial director of Anglo suggested that the problem of the petitioner's annuity might be worked out by Anglo sending over a certain amount of money to Standard and that the latter would pay the annuity.*

Statement of wherein the findings of fact are, with respect to this the Ninth Specification of Error, erroneous.— On direct examination petitioner testified: That prior to August 1939, he decided to retire from his position with Anglo (R. p. 65); that after making the decision to retire, he had conversations with Mr. Carder who was on the board of directors and financial director of Anglo; that he told Mr. Carder that he (petitioner) intended to live in the United States; that he told Mr. Carder further that when he (petitioner) retired (and he was planning on retiring) he would want his annuity payable to him in American dollars; that he and Mr. Carder discussed the matter of his

purchasing an annuity from an insurance company; and that then Mr. Carder suggested that it might be worked out by Anglo sending over a certain amount of money to Standard and the latter would pay the annuity (R. p. 66).

There is no evidence to the contrary. Hence there is no issue as to the facts in question.

It was error to fail to so find. The facts in question are material as showing how it happened that Standard paid the annuity to petitioner and as negativing the erroneous inference of The Tax Court of The United States that Standard in paying the annuity was satisfying an obligation incurred by it in 1931.

10. *The Tax Court of The United States erred in failing to find as a fact that pursuant to the resolution of the board of directors of Anglo, dated October 22, 1931, Anglo was obligated to pay petitioner a pension upon retirement of the sum of £7,293 per annum.*

Statement of wherein the findings of fact are, with respect to this the Tenth Specification of Error, erroneous.— On direct examination the petitioner testified: That the date upon which he had decided to retire was July 1, 1940; that in the last five years of his service with Anglo, his average compensation was £11,000 per annum; that on the basis of the resolution of October 22, 1931, he was to be deemed to have been in service since June 1902; that, on this basis, on July 1, 1940, he had been in service 38 years; that on July 1, 1940 he was sixty years of age; that the maximum annuity he could demand was 66.3 per cent of £11,000 or £7,293 (R. p. 67). In a memorandum dated June 29, 1939, from one executive of Standard to another, it was stated:

> "We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan

and their discount absorption program . . . the annuity. ... I give below a statement showing the amount of Mr. Wolfe's annuity computed as of five possible retirement dates, . . . :

Assumed Effective Date	Pounds
....	....
7/1/40	7,293
....	....”

(R. pp. 81-82.)

There is no evidence to the contrary. Therefore, there is no issue as to the truth of the facts in question.

It was error to fail to so find. The annuity which is the subject of this controversy is $36,465, which is £7,293 converted at $5.00 to the pound. That Anglo was, from October 22, 1931, obligated to pay this annuity is pertinent to the question of whether Standard had any obligation to petitioner or whether Anglo satisfied that obligation by purchasing an annuity from Standard.

11. *The Tax Court of The United States erred in failing to find as a fact that the petitioner was never in the employ of Standard or Export.*

Statement of wherein the findings of fact are, with respect to this the Eleventh Specification of Error, erroneous.— On direct examination the petitioner testified: That he was never in the employ of Standard; that he was never in the employ of Export (R. p. 68). Kenneth N. Rackley, called as a witness on behalf of the respondent, who was, at the time of the trial, secretary of the annuities and benefits committee of Standard (R. p. 77), testified, on cross examination, that to his knowledge petitioner had never been an employee of Standard; and that when he spoke on direct ex-

amination (R. p. 86) of the official file of Standard relating to the retirement of petitioner (R. p. 80) as the employee's file, it was not his intention to characterize petitioner as an employee of Standard (R. p. 86).

There is no evidence to the contrary. There is no issue therefore as to the truth of the facts in question.

It was error to fail to so find. The fact that petitioner was never an employee of either Standard or of Export goes to the heart of this controversy. Standard could not, under such circumstances, have had any obligation to him as an employee.

12. *The Tax Court of The United States erred in failing to find as a fact that petitioner considered that Anglo had an obligation to make retirement payments of some kind to him prior to the agreement of March 22, 1940; that Anglo was obligated only to pay an annuity based on petitioner's services and in accordance with Anglo's scheme of superannuation; and that that was Anglo's only obligation to the petitioner prior to the agreement of March 22, 1940.*

Statement of wherein the findings of fact are, with respect to this the Twelfth Specification of Error, erroneous. —On cross examination the petitioner testified: That he definitely considered that Anglo had an obligation to make retirement payments of some kind prior to the agreement of March 22, 1940; that Anglo was obligated only to pay an annuity based on his services and in conformity with Anglo's superannuation scheme; and that that was Anglo's only obligation to petitioner prior to the agreement (R. p. 73).

There is no evidence to the contrary. Hence there is no issue as to the truth of the facts in question.

It was error not to so find. Petitioner's understanding of what Anglo's obligation to him was, prior to the agreement of March 22, 1940, is certainly material to the question of the nature of the agreement by which that obligation was satisfied.

13. *The Tax Court of The United States erred in failing to find as a fact that at the time the petitioner became an employee of Anglo there was no correspondence or other writing entered into between himself and Anglo and Standard; that petitioner did not ever have any writing to evidence that he was being offered an executive position with Anglo; and that there was no type of contract entered into between petitioner and anybody else as to his employment by Anglo.*

Statement of wherein the findings of fact are, with respect to this the Thirteenth Specification of Error, erroneous.—On cross examination the petitioner testified: That there was no correspondence or other writing entered into between himself and Anglo, nor Standard, at the time or just about the time he went to work for Anglo; that he did not ever have any writing to evidence that he was being offered an executive position with Anglo (R. p. 74); and that there was no type of contract entered into between petitioner and any one else as to his employment by Anglo (R. pp. 74-75).

There is no evidence to the contrary. Consequently there is no issue as to the truth of the facts in question.

It was error to fail to so find. The facts in question are material to the issue of whether Standard in 1931 guaranteed petitioner's retirement pay and hence whether the contract of March 22, 1940 was a contract of annuity or a satisfaction by Standard of an obligation assumed by it in

1931. Since there was no writing, the alleged guarantee of Standard would have been unenforcible under the statute of frauds.

14. *The Tax Court of The United States erred in finding as a fact that petitioner paid no income tax to England or Canada on the payments made by Anglo to Standard.*

Statement of wherein the findings of fact are, with respect to this the Fourteenth Specification of Error, erroneous.—It is true that petitioner paid no income tax to England or Canada on the payments made by Anglo to Standard. It was, however, error to find this as a fact since whether a tax was paid to England or Canada is completely immaterial to the issue in this case. It may be, for all we are informed, that no tax was due to either England or Canada. In any event neither the English nor the Canadian income tax laws are material to a determination of the income tax laws of The United States.

15. *In the alternative, if it should be held that The Tax Court of The United States did not err as alleged in Specification of Error 14—The Tax Court of The United States erred in failing to find as facts that while petitioner was living in England and an officer of Anglo he did not prepare his own income tax returns; that his income tax returns were prepared by the solicitor for Anglo; that the solicitor for Anglo knew about the contract of March 22, 1940; that petitioner had told said solicitor about that contract; that said solicitor did not advise petitioner as to whether or not the pounds paid by Anglo to Standard were taxable to petitioner in England; that petitioner did not know anything about that particular phase (that is, the question of whether or not the pounds paid by Anglo to Standard were taxable to him in England) of the English income tax law; that no tax was withheld on the £89,120*

paid by Anglo to Standard; and that petitioner paid income taxes to England on his salary of £11,000 per year received from Anglo.

Statement of wherein the findings of fact are, with respect to this the Fifteenth Specification of Error, erroneous. —The only possible purpose of the respondent in offering proof that petitioner paid no income taxes to England or Canada on the £89,120 paid by Anglo to Standard was to create the inference that petitioner had not been meticulous in performing his tax obligations. If The Tax Court of The United States did not err in finding as a fact that petitioner did not pay income taxes to England on the stated sum, then it was error for the Court below to fail to find the other facts in the record which would have explained the facts found. Such other facts, none of which is disputed, are as follows:

On redirect examination, petitioner testified: That while he was living in England and an officer of Anglo, he did not prepare his own income tax returns; that his income tax returns were prepared by Mr. Montague Piesse, the solicitor for Anglo; that Mr. Piesse knew about the contract of March 22, 1940; that petitioner told Mr. Piesse about that contract; that Mr. Piesse did not advise petitioner as to whether or not the pounds paid by Anglo to Standard were taxable to petitioner in England; that petitioner did not know anything about that particular phase of the English income tax laws; that no tax was withheld by Anglo; and that petitioner paid income taxes to England on his salary of £11,000 per annum (R. p. 77).

16. *The Tax Court of The United States erred in finding as a fact that Standard has withheld income tax from the monthly payments made by Standard to the petitioner.*

Statement of wherein the findings of fact are, with respect to this the Sixteenth Specification of Error, erroneous. —It is true that Standard has withheld income tax from the monthly payments made by Standard to the petitioner. It was nevertheless error to find as a fact that Standard had withheld, for the reason that the fact of withholding is immaterial. The withholding was nothing more than an expression of Standard's judgment upon the issue involved in this case—an expression incidentally which was coloured by a desire to play safe. It was for The Tax Court of The United States (as it is for this court) to decide the issue between petitioner and respondent—not for Standard to do so. The Tax Court of The United States would have clearly erred had it asked Mr. Eckman, the respondent's counsel at the trial, for his opinion on the issue and had based a finding of fact on his opinion. The Court below equally erred when it based a finding of fact of this kind on the act of Standard, which clearly was merely protecting itself from possible liability if the issue in this case were decided against the petitioner.

17. *In the alternative, if it should be held that The Tax Court of The United States did not err as alleged in Specification of Error 16—then The Tax Court of The United States erred in failing to find as facts that the witness, George S. Koch, tax counsel for Standard, in directing Standard to withhold from the sums paid by Standard to petitioner, gave his opinion; that in doing so he expressed his legal opinion as a lawyer; that it was his duty to protect Standard; that any doubts would have been resolved in favor of Standard; that while at the time the decision was made, he did not have any doubts, he has since had doubts; and that he was simply advising his client, his employer, to do whatever would protect Standard most regardless of the effect upon petitioner.*

Statement of wherein the findings of fact are, with respect to this the Seventeenth Specification of Error, erroneous.—If it was not error for The Tax Court of The United States to find as a fact that Standard has withheld income tax from the monthly payments made by it to petitioner, then it was error for The Tax Court of The United States to fail to find the other undisputed facts in the record which explain the nature of and the reason for that withholding. Such other undisputed facts are as follows:

George S. Koch, called as a witness on behalf of the respondent, testified on direct examination: That he is tax counsel for Standard (R. p. 101); that he participated in the decision to withhold from the monthly payments made to petitioner by Standard; that such sums were withheld (R. p. 102); that he directed Standard to withhold those sums because the statute on withholding dealt with the question of wages, and wages only, and the regulations provided that pensions and retirement income were treated as wages; that that was the basis on which the decision was made. On cross examination, the witness testified: That he had given his opinion; that he had stated why he directed the withholdings; that in doing so he had expressed his legal opinion as a lawyer; that it was "assuredly" and "certainly" his duty to protect Standard; that any doubts would have been resolved in favor of Standard; that he did not necessarily believe he had any doubts when the decision was made; that frankly he has had doubt; and that he was simply advising his client, his employer, to so act that they would be protected "whichever way the cat jumped" (R. p. 104).

18. *The Tax Court of The United States erred in failing to find as a fact that on January 12, 1940, an executive of Standard wrote an executive of Anglo as follows:*

> *"When I wrote you the other day, I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, as a means of insuring that Anglo had discharged its liability for any pension payments to Mr. Wolfe.*
>
> *This phase of the case has not been adequately considered, and we are now undertaking to get our lawyers to agree to some formal release that will be agreed to before the annuity becomes payable on July the 1st.*
>
> *You can be sure that this will be advanced as promptly as possible."* (R. p. 85).

Statement of wherein the findings of fact are, with respect to this the Eighteenth Specification of Error, erroneous.—There can be no issue as to the existence of the quoted letter (R. p. 85).

It was error to fail to find said letter as a fact. The Tax Court of The United States did find as a fact the letter of January 9, 1940 (R. pp. 22-23), obviously the letter referred to in that part of the letter of January 12, 1940 which reads "When I wrote you the other day, I failed, etc." The Tax Court of The United States, in its opinion (R. p. 36), uses the letter of January 9, 1940 as evidence that petitioner's retirement would require Standard to put up money to provide for petitioner's retirement. But the letter of January 12, 1940 clearly indicates that the letter of January 9, 1940, relied upon by the Court below, was based upon a misunderstanding. "I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, as a means of insuring that

Anglo had discharged its liability for any pension payments to Mr. Wolfe." The liability of Anglo was its liability under the resolution of October 22, 1931—precisely the liability which it discharged by the agreement of March 22, 1940. Standard did not put up and was not required to put up any money. If petitioner lives long enough, so that the annuity paid to him by Standard exhausts the money paid by Anglo to Standard, Standard will, *like the writer of any annuity,* be required to use its own funds to continue to pay the annuity.

19. *The Tax Court of The United States erred in failing to find as facts the existence of the documents set forth on pages 90 to 93, both inclusive, pages 95 and 96, and pages 97 and 98 of the record.*

Statement of wherein the findings of fact are, with respect to this the Nineteenth Specification of Error, erroneous.—There can be no issue as to the existence of the documents in question. The secretary of the annuities and benefits committee of Standard (R. p. 77) testified that each was in the official file of Standard relating to the retirement of petitioner (R. pp. 80, 90, 95, 97).

It was error to fail to find the existence of said documents as facts. They, together with other facts in the record, indicate that the agreement of March 22, 1940 was the result of negotiation, not of an agreement made as far back as 1931 that Standard would guarantee petitioner's retirement pay in the event of his eventual retirement. They indicate that the process of negotiation which eventually took the form of Anglo's purchasing an annuity for petitioner from Standard was evolutionary. Finally, they indicate that the negotiations considered the contract of March 22, 1940 as the purchase by Anglo of an annuity for petitioner from Standard.

20. *The Tax Court of The United States erred in finding as a fact that petitioner had no control over the payment of the £89,120 by Anglo to Standard in 1939.*

Statement of wherein the findings of fact are, with respect to this the Twentieth Specification of Error, erroneous.—It is true that on cross examination petitioner testified that he had no control over "*Why* the payments were made, . . . *in August and December, 1939, when I did not retire until July, 1940*" (R. p. 76). This is the only evidence in the record having to do with control by petitioner over the payments. Obviously, petitioner's testimony had to do with the question of why the payments were made prior to his retirement instead of at the time of his retirement. The finding of fact is a distortion of the evidence. The payments were made as the result of negotiations of which petitioner was a party; to the extent that he participated in those negotiations he controlled the payments.

Specifications of Errors Relating to the Admission of Evidence

21. *The Tax Court of The United States erred in receiving in evidence testimony to the effect that the petitioner did not pay a tax to England or Canada on the £89,120 paid by Anglo to Standard.*

Quotation of the grounds urged at the trial for the objection:

> "Mr. Wynn: I object, your Honor.
>
> "Mr. Eckman: Your Honor, it shows how the witness considers the money was paid.
>
> "Mr. Wynn: It was not a question of what he considered it. It is what it was.
>
> Therefore I urge it is immaterial as to what he did as far as Canadian and English taxes are concerned" (R. p. 75).

The full substance of the evidence admitted. Petitioner did not pay any income tax to England or to Canada on the payment of the £89,120 paid by Anglo to Standard (R. pp. 75-76).

22. *The Tax Court of The United States erred in admitting to evidence testimony from the petitioner as to the purpose of Standard in withholding a part of the monthly payments made to the petitioner.*

Quotation of the grounds urged at the trial for the objection:

No grounds were urged for the reason that the Court overruled the objection before such grounds could be stated. The record (p. 76) is as follows:

> "Mr. Wynn: If your Honor please, I object to this witness being asked what purpose the Standard Oil Company of New Jersey had in that.
>
> "The Court: He is one party to this. He may have some knowledge that may be of value. The objection is overruled."

It had been the purpose of counsel for the petitioner to urge that the question "For what purpose did Standard withhold a part of the monthly payments to petitioner?" called for a conclusion.

The full substance of the evidence admitted.—The purpose of Standard in withholding a part of the monthly payments to petitioner was what the witness thought they would call a withholding tax (R. p. 76).

23. *The Tax Court of The United States erred in admitting the testimony of the witness, Kenneth N. Rackley, to the effect that he was familiar with the policy of Standard with regard to the retirement of its employees.*

Quotation of the grounds urged at the trial for the objection:

> "Mr. Wynn: If your Honor please, I object. There has been no proof in this record that Mr. Wolfe was ever an employee of the Standard Oil Company of New Jersey, and therefore I think this evidence is not pertinent to the issue before the Court.
>
> "He was an employee of the British company" (R. p. 78).

The full substance of the evidence admitted.—The witness was familiar with the policy of Standard with regard to the retirement of its employees (R. p. 78).

24. *The Tax Court of The United States erred in admitting the testimony of the witness, Kenneth N. Rackley, to the effect that Standard has never given a retiring employee a lump sum of money in lieu of pension payments; that Standard has never given a retiring employee a choice between receiving a lump sum of money and receiving the payments in the usual manner; and that such a lump sum payment would not be in accordance with the policy of Standard.*

Quotation of the grounds urged at the trial for the objection:

> "Mr. Wynn: If your Honor please, I object. In the first place, we concede that Mr. Wolfe was not entitled to any lump sum of money, so that this is not pertinent to the issue before the Court.
>
> "In the second place, what Standard Oil may have done to some other employees is not pertinent to the agreement it made with Mr. Wolfe" (R. p. 79).

The full substance of the evidence admitted.—Standard has not to the witness' knowledge ever given a retiring employee a lump sum of money in lieu of pension payment

(R. p. 79). Standard has not to the witness' knowledge ever given a retiring employee a choice between receiving a lump sum of money and receiving the payments in the usual manner (R. pp. 79-80). Such a lump sum payment would not be made in accordance with the policy of Standard (R. p. 80).

25. *The Tax Court of The United States erred in admitting to evidence testimony of the witness, Kenneth N. Rackley, to the effect that the file of Standard contains no mention or discussion of paying a lump sum to the petitioner upon his retirement.*

Quotation of the grounds urged at the trial for the objection:

> "Mr. Wynn: If your Honor please, I will have to renew my objection to this line of questions that I made a moment ago" (R. p. 86).

The full substance of the evidence admitted.—There is in the Standard file no mention or discussion of paying a lump sum to the petitioner upon his retirement (R. p. 86).

26. *The Tax Court of The United States erred in admitting in evidence the testimony of the witness, George S. Koch, to the effect that he participated in the decision to make withholdings from the monthly payments made by Standard to the petitioner; that such sums were withheld; and in admitting evidence as to why the witness, George S. Koch, directed Standard to withhold such sums.*

Quotation of the grounds urged at the trial for the objection:

> "Mr. Wynn: Your Honor, I object to it as being immaterial to the issue in this case" (R. p. 102).
>
> " . . . we are not interested in the legal opinion. I do not believe this Court needs the benefit of legal

> opinion. That is one of the questions for you to determine, sir. . . . I do not think that we are at all interested here in what the motives of Standard Oil Company may have been in withholding or not withholding in respect to Mr. Wolfe. At best it would be no more than the opinion of the executives of Standard Oil, including Mr. Koch, as to what they should do for their own protection. It has nothing to do with the issue before this Court, but it is primarily a matter of opinion. . . . I object to the characterization of Mr. Wolfe as an employee. That has not been proved." (R. p. 103).

The full substance of the evidence admitted.—The witness participated in the decision to make withholdings from the monthly payments made to petitioner by Standard. Such sums were withheld (R. p. 102). The witness directed Standard to withhold such sums because the statute on withholding dealt with the question of wages, and wages only, and the regulations provided that pensions and retirement income were treated as wages. That was the basis on which the decision was made.

Specifications of Errors Not Relating to the Findings of Fact and Not Relating to the Admission of Evidence

27. *The Tax Court of The United States erred in concluding that the amounts received by petitioner were not received as an annuity under an annuity contract, but were received as a pension in consideration of services rendered in prior years.*

28. *The Tax Court of The United States erred in concluding that "the arrangement carried out here provided 'benefits from a retirement fund' in the nature of pension compensation for services rendered."*

29. *The Tax Court of The United States erred in concluding that if the petitioner had not "taxable income" in 1940 in the "annuity" funds, he had no cost to recover tax free later.*

30. *The Tax Court of The United States erred in entering its final order of redetermination that there is a deficiency in income tax for the year 1941 in the amount of $1,101.49.*

31. *The Tax Court of The United States erred in failing to enter a final order of redetermination that there is no deficiency in income taxes for the year 1941.*

SUMMARY OF THE ARGUMENT OF THE CASE

The decision below should be reversed (1) if in the taxable year 1941, an amount was received as an annuity under an annuity contract, and (2) if a premium or consideration was paid for such annuity.

In the taxable year 1941 an amount was received as an annuity under an annuity contract. It is not disputed that an amount was received. Said amount was received as an annuity under an annuity contract. The agreement under which the amounts were received is within every legal and commonly accepted meaning of the term. The fact that the contract was not a commercial annuity is immaterial. The reasoning of the Court below is unsound. Whether Standard guaranteed petitioner's pension and whether Anglo merely made a contribution to the cost of that pension is immaterial; but the facts are that neither of those premises is supported by the record. *Hooker* v. *Hoey* (27 Fed. Supp.

489, affirmed 107 F. (2d) 1016) is not a precedent for a decision adverse to the petitioner.

A premium or consideration of $415,786.75 was paid for such annuity. That the payment was made is not in dispute. Under the decisions that payment was "the aggregate premiums or consideration paid for such annuity". The fact that petitioner was a non-resident alien at the time of such payment and therefore paid no income tax on said payment is immaterial. Income is determined by its nature not by the fact that a tax has been paid thereon.

ARGUMENT OF THE CASE

Introduction

Section 22 (b)(2) of the Internal Revenue Code (Title 26 of The United States Code) as that section applied to the taxable year 1941 so far as pertinent * to this matter reads as follows:

> . . . Amounts received as an annuity under an annuity . . . contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity . . . until the aggregate amount excluded from gross income under this chapter ** or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. . . .

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* For the convenience of the Court, section 22 (b), as that section applied to the taxable year 1941, is set forth in full in Appendix A.

** Chapter 1.

By reason of the portion of the statute just quoted, the validity of the following proposition cannot be successfully questioned:

A decision determining a deficiency of income taxes for the taxable year 1941 is erroneous and should be reversed:

(1) If, in the taxable year 1941, an amount was received as an annuity under an annuity contract;

(2) If a premium or consideration was paid for such annuity.

Since the decision now being reviewed by this Court is a decision of The Tax Court of The United States determining a deficiency of income taxes for the taxable year 1941 (R. p. 40), that decision is erroneous and should be reversed if the two conditions enumerated in the above stated proposition exist.

This argument will seek to establish that said two conditions do exist.

I.

In the Taxable Year 1941 an Amount was Received as an Annuity Under an Annuity Contract

In the taxable year 1941, an amount was received.—That petitioner received an amount from Standard in the taxable year 1941 is not in dispute. It has been properly so held in the findings of fact (R. p. 26).

The amount so received was received as an annuity under an annuity contract.

The agreement under which the amounts were received is within every legal and commonly accepted meaning of the term.—The amount so received was received pursuant

to the agreement of March 22, 1940 (R. pp. 23-26). By the terms of that agreement, Standard agreed to pay petitioner *"a life annuity"* (R. pp. 24-25); petitioner accepted *"this annuity"*; and Anglo paid Standard £89,120 toward the cost of *"the annuity"* (R. p. 25).

Such a contract is an annuity by any definition known either in law or in common parlance.

The agreement of March 22, 1940 was executed by petitioner and Standard at the latter's principal office located at 30 Rockefeller Plaza, New York, New York, and by Anglo at its principal office in London, England. These facts of the execution of the agreement were taken to be true and set forth in a stipulation of facts executed by opposing counsel (R. p. 58). It is submitted that in view of the facts present in this case, the validity of the agreement of March 22, 1940 should be governed by the laws of the State of New York.

Under the laws of the State of New York, the agreement of March 22, 1940 was an annuity contract. Paragraphs 1 and 2 of Section 46 of the New York Insurance Law read as follows:

> 1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.
>
> 2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments,

> or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one.

Since the agreement of March 22, 1940 was an "agreement to make periodical payments," since "the making and continuance of . . . such payments" was "dependent upon the continuance of human life," and since the agreement was not a life insurance contract, the agreement was an annuity contract.

The Tax Court of The United States dismisses the foregoing definition with the statement, "Such law does not control interpretation of section 22 (b)(2)" (R. p. 31). Assuming that the laws of the State of New York do not govern, the fact remains that Congress in enacting section 22 (b)(2) used the word "annuity". In so using that word, Congress must have intended it to have the meaning usually given to it. We submit that the New York definition is the meaning usually given to the word and hence is the meaning intended by Congress. In any event, no other definition which might have been intended by Congress has been suggested.

The respondent's regulations (Section 29.22 (b)(2)-2, Reg. 111) define an annuity as follows:

> Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. . . .

The Tax Court of The United States dismisses the respondent's own definition of the term "amounts received as an annuity under an annuity contract" by saying "The regulation does not say that every periodic payment is annuity" (R. p. 31). But the regulation *does* say that "amounts received in periodical installments . . . monthly . . . for life, and which installments are payable or may be payable over a period longer than a year" are within the term "amounts received as an annuity under an annuity . . . contract." Since the amounts received by petitioner were "amounts received in periodical installments . . . monthly . . . for life", and since such "amounts" were "payable or" might "be payable over a period longer than a year", such amounts are "amounts received as an annuity under an annuity . . . contract" within respondent's own definition of the term. The Tax Court's disregard of the definition in the regulations is about as logical as would be the refusal to concede that a red headed man is an animal because the definition "animals include men having hair" does not assert positively that all men are animals.

We may concede without injury to our cause that the respondent's definition of an annuity is not a very good one. An opinion of one of the respondent's legal advisers contains a better one:

In Solicitor's Opinion 160 (C. B. III-2, 60) the then Solicitor of Internal Revenue stated:

> " . . . An annuity is defined in the following manner by Coke: 'An annuity is a yearly payment of a certaine summe of money granted to another in fee for life or yeares, charging the person of the grantor onlye.' (Coke's Littleton 144b (quoted with approval in Kent's Commentaries (14th edition), Part VI, page 460); Bouvier's Law Dictionary (Nalle 3d revision), 201.) However, the term has come to have

> a somewhat broader meaning, and designates a fixed sum, granted or bequeathed, payable periodically, but not necessarily annually, subject to such specific limitations as to its duration as the grantor or donor may lawfully impose. (3 Corpus Juris, 200.) The essential element is the certainty of the amount to be paid periodically at a certain rate per annum or in a certain aggregate annual amount. (*Peck* v. *Kinney,* 143 Fed., 76, 80.) It was said by the Supreme Court of the State of Ohio in the case of *Chisholm* v. *Shields* (67 Ohio State 374, 66 N. E., 93, 94) that 'an annuity, as understood in common parlance, is an obligation by a person or a company, to pay to the annuitant a certain sum of money at stated times during life, or a specified number of years, in consideration of a gross sum paid for such obligation.' An annuity, then, is a stated sum payable periodically at stated times during life, or a specified number of years, under an obligation to make the payments in consideration of a gross sum paid for such obligation. . . ."

The amounts received by petitioner from Standard were amounts received as annuities under an annuity contract within the definitions of Lord Coke, of Chancellor Kent, of Bouvier, of Corpus Juris, of *Peck* v. *Kinney, supra,* and of *Chisholm* v. *Shields, supra.* Finally they are within the meaning of that term as defined by the Solicitor of Internal Revenue. Each such amount was "a stated sum payable periodically at stated times during life . . . under an obligation to make the payments in consideration of a gross sum paid for such obligation."

The reasoning of The Court below.—The Court below concluded that the amounts received by petitioner from Standard were not amounts received as an annuity under an annuity contract because (1) the contract of March 22, 1940 "was not, in form, any usual commercial annuity" (R. p.

29); and (2) the amounts were received as a pension for services rendered.

We will discuss below, in the order stated above, the reasons of the Court below for deciding that the amounts received by petitioner from Standard were not amounts received as an annuity under an annuity contract.

The fact that the contract of March 22, 1940 was not a commercial annuity contract is immaterial.—In *Gillespie* v. *Commissioner of Internal Revenue* (128 F. (2d) 140) this Circuit Court stated:

> "... That the contract was not labeled 'annuity contract' is immaterial. *Bodine* v. *Commissioner, supra.** ... It is likewise immaterial, if true, that the corporation was not authorized by law to make an annuity contract; for, whether authorized or not, such a contract was made and payments thereunder were received by the taxpayer. ..."

(See also *Raymond* v. *Commissioner of Internal Revenue,* 114 F. (2d) 140; *Beattie* v. *Commissioner of Internal Revenue,* 6 T. C. 609, aff'd 159 F. (2d) 788.)

The reasoning of the Court below that the amounts received by the petitioner from Standard were received as a pension and not as an annuity, is unsound.—While we freely admit that the underlying reason for the making of the contract of March 22, 1940, was the fact that petitioner had rendered services to Anglo and that Anglo was obligated to pay petitioner a pension, the fact remains that, technically, Anglo satisfied that obligation by paying £89,120 to Standard in consideration of Standard's writing an annuity on petitioner's life. A pension for services rendered is paid by the employer. Anglo, which had an obligation to pay such a pension, satisfied that obligation.

* 103 F. (2d) 982.

Standard, which had no such obligation, received £89,120 from Anglo and agreed to pay petitioner, not a pension but an annuity. The record amply supports the above stated conclusions.

Before going to England petitioner had expected to be entitled to participate in Anglo's superannuation scheme (R. p. 61). After he arrived in England he found that he was not entitled to participate in that plan and that the plan was not in good financial condition (R. pp. 63, 65). It was also obvious that petitioner, had he been eligible under that plan, would, after a given period, say 10 years, of service with Anglo, have been entitled to a pension of only £2,200, based on his salary of £11,000.

Petitioner discussed these matters with Standard and with other executives of Anglo.

The *only* results of the conversations with Standard were that it was decided that "this question is to be deferred until the Anglo-American Oil Company has revised its annuity plan" and that it was recognized that if the proposed revision of Anglo's plan did not "fully take care of Mr. Wolfe's case" "the matter will have to be given special consideration at the proper time" (R. pp. 18, 80-81).

On the other hand, in the discussion with other executives of Anglo, in addition to an agreement being reached that petitioner would be considered on the same basis as those who were entitled to participate in Anglo's superannuation scheme (R. pp. 17, 64), it was further agreed that petitioner was to be treated as if he had been in the employ of Anglo from June 1902 (R. pp. 19, 64). These agreements were embodied in the resolution of October 22, 1931 (R. pp. 19, 64, 67), which resolution not only established Anglo's obligation to pay petitioner a pension but

fixed the formula by which the amount of that pension was to be determined.

When in 1939, as the result of the advice of petitioner's physician that he live in America (R. pp. 65-66), he began giving thought to retiring and requested of Anglo that his pension be payable in dollars, it was an executive of Anglo who, for the first time, suggested the possibility of Anglo's satisfaction of its obligation to pay a pension to petitioner by purchasing an annuity from Standard (R. p. 66).

This suggestion led to discussions with, but not to immediate acquiescence by, Standard. On June 16, 1939 an executive of Standard wrote "the problem of paying your annuity . . . at this end has been left for future consideration" (R. pp. 87-88).

On June 21, 1939, an employee of Standard wrote an executive of Standard: "If the retirement goes through you might wish to give consideration to having the payments made from New York *with a periodic billing of Anglo.* It might turn out to be to the company's benefit to handle the matter under such an arrangement if Mr. Wolfe is in poor health" (R. p. 91). This suggestion was the direct opposite of the purchase of annuity by Anglo for petitioner. Had this plan been adopted Anglo would have continued to be liable for petitioner's pension as long as petitioner lived. The same observations are true of the proposals "subject to proper approval" in the memorandum of June 29, 1939 (R. pp. 20, 21, 82-83) (see page 12 herein). Had Anglo, in accordance with that proposal, transferred to Standard "for deposit to the sub-account for assigned expatriates in the annuity fund the estimated present value of Anglo's liability," Anglo would not have thereby been relieved of any liability. It would merely have been paying a pension.

It is obvious, however, that Anglo wanted no such arrangement. It wanted no uncertain future liability for a pension for the duration of petitioner's life. On August 4, 1939, the executive of Anglo who had originally suggested the purchase of the annuity from Standard, wrote: "it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement. . . . Our actuary advises us that the capital liability of the amount of annuity if payable as from 1st January 1940 works out at £88,049 and the present value of this as at 1st September 1939 is £87,177." On August 22, 1939, Anglo remitted the said sum of £87,177. On January 12, 1940, an executive of Standard wrote an executive of Anglo: "When I wrote you the other day, I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, *as a means of insuring that Anglo had discharged its liability for any pension payments to Mr. Wolfe*" (italics supplied) (R. p. 85). On March 22, 1940, in transmitting the agreement of that date to Anglo, an executive of Standard wrote: "We believe, nevertheless, that the revised agreement accomplishes *the protection for Anglo* which you sought in your draft of the agreement." (R. p. 96).

It is thus apparent that in the beginning of the 1939 negotiations Standard sought to act as a mere conduit by which Anglo would, throughout petitioner's life, satisfy its obligation to pay him a pension, and that Standard finally acquiesced in Anglo's proposal that Standard accept £89,120, agree to pay petitioner an annuity, and entirely relieve Anglo of further liability for the payment of a pension to petitioner. The agreement of March 22, 1940, did precisely that.

> " . . . 1. . . . Standard . . . hereby covenants to pay Mr. Wolfe a life annuity . . . " (R. p. 24).

"3. In consideration of Mr. Wolfe's valuable services to . . . Anglo . . ., Anglo . . . has paid to . . . Standard . . ., as a contribution toward the cost of the annuity settlement, the sum of £89,120-0-0, the receipt of which sum . . . Standard . . . doth hereby acknowledge.

4. In consideration of the aforesaid payment . . . Standard . . . hereby indemnifies and for all time agrees to keep indemnified . . . Anglo . . . from and against any liability which . . . Anglo . . . might otherwise have had to Mr. Wolfe in respect to a pension" (R. p. 25).

The Court below supports its decision by arguing that Standard, in entering into the agreement of March 22, 1940, was merely fulfilling a guarantee it had made to petitioner in 1931, that it is, in paying the annuity, merely fulfilling its own obligation to pay petitioner a pension, and that Anglo merely made a contribution toward the cost of the annuity by which that pension was paid.

The position of the Court below is untenable in at least two respects:

In the first place, it should not make the slightest difference in the ultimate decision of this case whether Standard guaranteed petitioner's pension in 1931, whether Standard was or is obligated to pay petitioner a pension, and whether Anglo paid all of the cost or merely made a contribution to the cost of the annuity.

In *Brodie* v. *Commissioner of Internal Revenue,* 1 T. C. 275, a corporation purchased for the taxpayer a paid-up *retirement annuity as additional compensation for services rendered.* The Tax Court properly held that the cost of the annuity was taxable income to the taxpayer. Com-

menting on the treatment to be accorded the future annuity payments for income tax purposes, the Court said:

> "If and when petitioners begin to draw their annuities, assuming that the law remains what it now is, they will receive a tax benefit from the compensation payments with which they are now being taxed. *For example, section 22 (b)(2) of the Internal Revenue Code reads in part as follows:...*" (Italics supplied.)

To the same effect is *Freeman* v. *Commissioner of Internal Revenue* (4 T. C. 582, on appeal C. C. A., 2), where the Court said:

> " . . . Payments under the annuity contracts may be reported properly under section 22 (b) (2) . . . "

In the instant case let us assume that the premises of the Court below are correct, that Standard did guarantee the petitioner's pension, that Standard did have an obligation to pay a pension to petitioner, and that Anglo merely made a contribution to the cost of the annuity. Even with these assumptions it cannot be denied that Anglo also had an obligation to pay petitioner a pension. Suppose Standard, instead of being an oil company, had been an insurance company owning all of the stock of Anglo, and having the obligations to petitioner which the Court below assumes. If, under these circumstances, Anglo had paid Standard £89,120 in consideration of Standard's agreement to pay petitioner an annuity and to indemnify Anglo from any further claims from petitioner for pension, would the arrangement be any the less an annuity? The only difference which we have assumed in making this argument is that Standard is not an insurance company, and, as we have already seen, the fact that Standard is not an insurance company is immaterial. (See page 52, herein.)

In the second place, the Court's premises are incorrect.

Standard did not guarantee the payment of petitioner's pension. It is true that the preamble to the agreement of March 22, 1940, recites that petitioner undertook the assignment with Anglo "on the understanding that if he were eventually retired from the service of the Anglo company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo company as in effect on the date of retirement and that payment of such sterling pension would be guaranteed by the Standard company in dollars at an exchange rate of five dollars to the pound." (R. pp. 23-24).

Petitioner testified, however, that in none of the conversations he had prior to going to England was the question of his retirement pay in the event of his eventual retirement ever mentioned (R. p. 61); that Standard did not guarantee the payment of his retirement pay (R. pp. 73-74); and that the "understanding" referred to in the preamble to the agreement of March 22, 1940, was "my understanding. I had not discussed the matter with any official of Standard Oil Company of New Jersey or the Imperial Oil Company, Ltd." (R. p. 61).

The agreement of March 22, 1940, was drawn by an executive of Standard, and no doubt stated as premises what were in fact the state of mind of the parties after the negotiations leading up to that contract were concluded. In any event there is ample evidence in the record to support the petitioner's testimony.

In 1931 petitioner was a Canadian citizen (R. pp. 5, 13, 16) who had always lived in Canada (R. p. 16). He was contemplating taking a position of indefinite duration in England. Why, even if he had thought of demanding that his retirement pay, in the event of a then uncontemplated retirement, be guaranteed by Standard, should he have de-

manded that it be paid in dollars? The record is clear that the idea of payment in dollars arose *in 1939,* as the result of the advice of petitioner's physician that petitioner live in California (R. pp. 65-66). It was as the result of this advice that petitioner *in 1939* made the request for payment in dollars.

That Standard did not *in 1931* guarantee the payment of petitioner's retirement pay, in dollars or in any other way, is indicated by other facts in the record.

1. There was no writing to indicate that petitioner was being offered a position by Anglo (R. pp. 74-75). Assuming that Standard made the alleged guarantee it was wholly unenforcible.

The New York law is as follows:

> New York Personal Property Law. Section 31. Agreements required to be in writing.
>
> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;
>
> * * * * * *
>
> 2. Is a special promise to answer for the debt, default or miscarriage of another person; * * *

See also:—

Union Properties v. *Bogdanoff* (250 App. Div. 282);

Rosenkranz v. *Schreiber Brewing Co.* (287 N. Y. 322);

Terminello v. *Bleecker* (155 Misc. 702);

Witschard v. *A. Brody & Sons* (257 N. Y. 97);

Bulkley v. *Shaw* (289 N. Y. 133).

2. Petitioner assumed that he would be eligible to participate in the superannuation scheme of Anglo (R. p. 61). It was not until he found that he was not in fact so eligible that he raised the question (R. pp. 63, 65). Is it reasonable to suppose that, feeling that he was adequately protected, he would have asked for guarantees?

3. In the discussions which petitioner had with an executive of Standard following the suggestion made by an executive of Anglo that Anglo purchase an annuity from Standard, the executive of Standard asked what rate of exchange petitioner would want (R. p. 67). On June 16, 1939, the same executive of Standard wrote: "The problem of paying your annuity in dollars at this end has been left for future consideration" (R. pp. 87-88). All of this is inconsistent with the idea that Standard had at any prior time guaranteed the payment of petitioner's pension in dollars at $5.00 to the pound. So also is the memorandum accompanying the letter of June 16, 1939 which gave "the amount of annuity" due petitioner, assuming his retirement on various dates *in pounds, not* in dollars (R. p. 89). Again the memorandum of June 21, 1939, gave the annuity, this time in dollars, but converted, not at $5.00 to the pound but at $4.68 to the pound. In the same memorandum it was suggested that consideration be given "to having payments made by New York with a periodic billing to Anglo" (R. p. 91). The idea of a periodic billing to Anglo was certainly inconsistent with the idea that Standard had any then existing obligation to pay petitioner's pension. If Standard had *in 1931* guaranteed the payment of petitioner's pension at $5.00 to the pound, why *on June 29, 1939,* was the payment of the annuity "by New York in dollars, converted at the rate of $5.00 to the pound" (there was incidentally no mention made of any guarantee other than "any cost incurred in New York by reason of a sterling rate less than $5.00 would be

absorbed by Jersey") "subject to proper approval"? (R. pp. 81-83.) If it had been guaranteed, it needed no approval. Finally, the letter of January 9, 1940 (R. pp. 22-23) announces, as if it were something *new:* "We have undertaken to guarantee Mr. Wolfe, etc." *

The Court below argues that Standard must have had an obligation to pay all or a part of petitioner's pension because the pension was in part based on years of service rendered by petitioner before he entered the employ of Anglo. There is not a shred of evidence that the arrangement evidenced by the resolution of October 22, 1931, whereby petitioner was to be considered to have been in the employ of Anglo since 1902, was ever discussed with Standard. That was a contractual arrangement between Anglo and petitioner with which Standard had nothing to do. Petitioner simply made a request which was agreed to by Anglo.

Anglo did not merely make a contribution to the cost of petitioner's pension. Anglo paid Standard the full cost of that pension computed on an actuarial basis. As a result of the resolution of October 22, 1931, Anglo was obligated to pay petitioner, assuming his retirement on July 1, 1940, a pension of £7,293 (R. p. 67). If he had retired on January 1, 1940, the amount would have been £7,095 (R. p. 82).**

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* This letter in proceeding "that the money which you provided plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled" was written under a misunderstanding—a misunderstanding which was recognized by the letter of January 12, 1940 (R. p. 85). The fact remains, however, that even the situation as misunderstood is clearly inconsistent with the idea that Standard had theretofore made any guarantee to, or had any liability to, petitioner.

** Incidentally, Standard's pension plan was obviously not identical with Anglo's. In the letter of June 29, 1939, it was said: "We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan and their discount absorption program (*the latter* being identical to ours)." In other words, the former, the plan, was not identical.

In the letter of August 4, 1939 (R. pp. 83-84) it was stated: "*Our actuary* advises us that the capital liability of the amount of annuity if payable as from *1st January 1940* works out at £88,049, and the present value of this as at 1st September 1939 is £87,177." Anglo paid said £87,177 in August 1939, thus paying the full then value of the capital liability on the assumption petitioner was to retire on January 1, 1940. Instead of retiring on that date, petitioner retired on July 1, 1940, so that the payment of £87,177 was not enough. Therefore an additional £1943 was paid.

The only contribution Standard will ever have to make will be made if petitioner survives his expectancy of life. Every writer of every annuity takes the risk that the annuitant will live longer than expected.

Hooker v. *Hoey* (27 Fed. Supp. 489, aff'd 107 F. (2d) 1016) *is not a precedent for a decision adverse to the petitioner.*—The Court below rests its decision that the amounts received by petitioner from Standard were not amounts received as an annuity under an annuity contract on the authority of *Hooker* v. *Hoey* (27 Fed. Supp. 489, aff'd 107 F. (2d) 1016).

The taxpayer in the *Hooker* case had been an employee of Vacuum Oil Co. He became entitled to receive a pension from Vacuum and actually received a pension paid by Vacuum for a period of time. This was clearly no "contract of annuity." It was the situation which would have existed had petitioner received his pension from Anglo. Thereafter, Vacuum was succeeded by Standard Oil Co. of New York. Standard Oil Co. of New York became possessed of all the assets, and assumed all the liabilities, of Vacuum. The pensioner attempted to spell out a "contract of annuity" on the theory that when Vacuum transferred all its assets to Standard Oil Co. of New York and the latter assumed the

liability for the pension, along with all the other liabilities of Vacuum, Vacuum had purchased an annuity for the pensioner from Standard Oil Co. of New York.

Any analogy to the instant case is, to say the least, strained. In the *Hooker* case there was no contract of annuity either when the pension was granted or when the merger of the two corporations occurred. In the instant case, Anglo paid Standard the then value, computed actuarially, of the capital liability it had incurred to petitioner. Standard, specifically in consideration of such payment, bound itself to pay petitioner an annuity. Anglo was relieved of and indemnified against liability for all time. This we submit was no mere substitution of Standard for Anglo; it was a contract of annuity and the amounts received by petitioner were "amounts received under a contract of annuity."

II.

A Premium or Consideration of $415,786.75 Was Paid for Such Annuity

That Anglo paid Standard £89,120 or $415,786.75 (R. p. 26) and that Standard "agreed to accept the aforesaid £89,120-0-0 from The Anglo Company and to pay Mr. Wolfe a life annuity" (R. p. 24) can not be questioned.

Was such payment "the aggregate premiums or consideration for such annuity"?

It has been repeatedly and uniformly held that the entire cost or purchase price of the annuity, when purchased by an employer for an employee as additional compensation, is includible in the gross income of the annuitant in the year of purchase and recovered by the annuitant under the method prescribed in section 22 (b)(2) of the Internal Revenue Code.

In *Brodie* v. *Commissioner of Internal Revenue* (1 T. C. 275) a corporation purchased for the taxpayer a paid-up retirement annuity as additional compensation for services rendered. The petitioner had no right to a cash payment in lieu of the annuity, the policy could not be assigned, nor was there any cash surrender feature. The respondent proposed a deficiency in income taxes based upon the determination that the purchase price of the annuity was includible in gross income in the year of purchase. The Court, holding for the respondent, stated:

> "The Board said in *N. Loring Danforth, supra,** 'That the purpose, plan and effect was to give petitioner this additional compensation for his services is manifest. The benefit was directly to him, and the corporation received no more benefit than any employer derives when it increases the compensation of its employee. . . .'
>
> "The facts being what they are, we can see no distinction in principle from the issue involved in the instant proceedings and that which was involved in the above cited cases. It seems to us that our decision must be the same. . . ."

As to the recovery of the cost of the annuity, the Court said:

> ". . . If and when petitioners begin to draw their annuities, assuming that the law remains what it now is, they will receive a tax benefit from the compensation payments with which they are now being taxed. For example, section 22(b)(2) of the Internal Revenue Code reads in part as follows: . . ."

In other words, the Court held that the amount paid by the employer was "the aggregate premiums or consideration paid for such annuity" within the meaning of section 22(b)(2).

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* 18 B. T. A. 1221.

The Tax Court of The United States and the Circuit Court of Appeals reached the same conclusions in *Freeman* v. *Commissioner of Internal Revenue* (4 T. C. 582, on appeal C. C. A.-2); *Hackett* v. *Commissioner of Internal Revenue* (5 T. C. 1325, aff'd 159 F. (2d) 121, C. C. A.-1); *Oberwinder* v. *Commissioner of Internal Revenue* (147 F. (2d) 255, C. C. A.-8, aff'g T. C. Memo. April 26, 1944); *Hubbell* v. *Commissioner of Internal Revenue* (150 F. (2d) 516, C. C. A.-6, aff'g 3 T. C. 626); and *Ward* v. *Commissioner of Internal Revenue* (159 F. (2d) 502, C. C. A.-2, aff'g T. C. Memo. November 29, 1945).

In the *Hackett* case, *supra,* The Tax Court said:

> " . . . Furthermore, we specifically held in *William E. Freeman, supra*, that the cost ($71,339.20) of the annuity contracts there involved which had been purchased to compensate Freeman was income to him in 1939, when the contracts were received, and that 'Payments under the annuity contracts may be reported properly under section 22 (b)(2), and for that purpose $71,339.20 will represent their cost.' In other words, in the *Freeman* case *we construed the words 'aggregate premiums or consideration paid for such annuity' to include payments by others on behalf of the annuitant in the form of compensation* as well as by the annuitant himself. . . . " (Italics supplied.)

As to the treatment of the amounts received by the annuitants The Tax Court said in the *Ward* case, *supra*:

> "Section 22 (b)(2) of the Internal Revenue Code provides that income from annuity payments in excess of 3 per cent of the consideration paid shall be excluded from gross income until the aggregate amount excluded from gross income equals the aggregate premiums or consideration paid for the annuity; in other words, that up to the amount of the consideration paid the petitioner will not be taxed upon the

> annuity payments . . . except to the extent of 3 per cent of the aggregate premiums or consideration paid for the annuity. . . . "

The *only* differences between the instant case and the cited cases are: In the cited cases the annuities were purchased from insurance companies (which, as we have seen—see page 52 herein—is immaterial), and in the cited cases the annuitant paid income taxes to The United States on the aggregate premiums or consideration paid for the annuity. The Court below rests its opinion in this respect on the latter difference, citing *Jones* v. *Commissioner of Internal Revenue* (2 T. C. 924).

We concede that the petitioner paid no income tax to The United States in 1940 based upon the inclusion in his gross income of the purchase price of the annuity. However, when the consideration for the annuity was paid, petitioner was a non-resident alien (R. p. 16) and as such was not required by law to pay any income tax to The United States. However, it cannot be doubted that if the petitioner had been a resident of The United States he would have been taxable on the purchase price of the annuity under the rule laid down in the *Brodie* line of cases. The inquiry therefore resolves itself into this: Is a receipt income because of its nature, as we contend, or is it income because an income tax has been paid upon it, as the Court below reasons? An income tax is a mere incident to income; the fact of the income tax does not make an item income. Its nature makes it income, and because it is income, the income tax attaches.

Under the rationale of the *Brodie* line of cases, the payment by Anglo to Standard was *by its nature* income. The fact that the petitioner's status at the time as a non-resident alien prevented the imposition of the tax, is immaterial.

We frankly do not know whether the payments made by Anglo to Standard would have been considered income under the English income tax laws. We do know that petitioner was not advised by the solicitor, who prepared his returns and who knew the facts, to report it (R. p. 77), but even if we assume that it was not taxable in England, we submit that we are here considering an American, not an English, statute. It was income under our law, and that is all that is material. In England, capital gains are not taxed. Let us suppose that an Englishman, living in England, exchanges the stock of Corporation A which cost him $100, not in a corporate reorganization, for stock of Corporation B having a value of $200. Under English law, the gain of $100 is not taxed. Had our Englishman been a resident of The United States when he made the exchange the $100 would have been taxable. Will it be seriously argued, that if he becomes a resident of The United States, bringing the B stock with him, his basis for determining gain or loss on a sale of the B stock in The United States is anything other than the $200—its value when he received it? We think not. It is American law that governs.

CONCLUSION

The decision of The Tax Court of The United States should be reversed.

Dated: Los Angeles, California,
January 12, 1948.

Respectfully submitted,

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APPENDIX A

Section 22 (b) of the Internal Revenue Code (Title 26 of The United States Code):

Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter: *

(2) *Annuities, Etc.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph. The preceding sentence shall not apply in the case of such a transfer if such contract or interest therein has a basis for determining gain or loss in the hands of a transferee determined in whole or in part by reference to such basis of such contract or interest therein in the hands of the transferor.

* Chapter 1.